UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIA HENRY, *et al.*, individually and on behalf of all others similarly situated, Plaintiffs, v. BROWN UNIVERSITY, *et al.*, Defendants.	Case No.: 22-cv-00125 Hon. Matthew F. Kennelly

JUNE 9, 2023, JOINT STATUS REPORT

I. Plaintiffs' Statement of Relevant Issues

Plaintiffs respectfully submit that there are several issues for the Court to understand the status of the case and, in some instances, to provide guidance.

First, certain Defendants are overusing the Attorneys'-Eyes-Only designation, making discovery inefficient and more costly as the parties waste time fighting over confidentiality designations and how to show deposition witnesses pertinent documents. Plaintiffs have approached the Defendants about various compromises and requests to mass de-designate documents. The parties have made substantial progress in that regard. When the Parties started the process of meeting and conferring a couple months ago about the extent of the AEO designations, four universities had applied the strict AEO definition and designated 2% of their documents or fewer as AEP, while several had designated more than 5%, and seven even had double digit percentages (one as high as 57%). We have made progress but are still trying to resolve the excessive designation issues with 8 universities.

Such mass-AEO designation makes the process for challenging AEO designations in the Confidentiality Order (at 15-16) unduly cumbersome. The mass designation also goes against the Court's "Miranda" warning in the context of privilege logs and redactions that overzealous protection of information and documents is inappropriate. *See* Oct. 26, 2022 Tr. 40:16-18, 24-25; Dec. 21, 2022 Tr. 6:18-25. Having brought the issue to the Court's attention, Plaintiffs will continue to try to resolve the issue with Defendants, but expect to have to file a motion for the relief that Plaintiffs regard as sensible and appropriate.

Second, the most immediate impact of the AEO over-designation problem is that Plaintiffs are stymied when trying to show AEO-tagged documents to a Defendants' own current employees (unless it is indisputable that the witness authored or previously received the document). If there were only a few such AEO documents, Plaintiffs could negotiate them on a one-off basis. As a

practical matter, however, the sheer number of AEO documents makes that impossible. In a last attempt to find a compromise solution to avoid the need for Court guidance, as the parties have done since March, on June 5, 2023, Plaintiffs wrote to Defendants seeking permission to "use documents that have been designated Attorneys' Eyes Only ('AEO') by Defendants in depositions with current and former employees of the individual University from which the documents originated." Defendants declined to provide such permission.

The parties are thus at an impasse, and a number of depositions are scheduled and being scheduled for this summer; and, as noted, the parties are still negotiating the broader AEO dispute with the Defendants as a group and at the individual level. Accordingly, Plaintiffs ask the Court for a limited amendment to paragraph 6(c) of the Confidentiality Order (Dkt. No. 254), adding a new category of person who can review AEO documents. The new paragraph would read:

> **Employees at Depositions**. During their depositions or in preparation for their deposition, witnesses in this action who are current employees of the Party from which the documents originated, provided that counsel for the party intending to disclose the information has a good-faith basis for believing that such information is relevant to events, transactions, discussions, communications, or data about which the witness is expected to testify or about which the witness may have knowledge. Witnesses shall not retain a copy of **ATTORNEYS' EYES ONLY** documents, except witnesses may receive a copy of all exhibits marked at their depositions in connection with review of the transcripts and may receive sealed copies of exhibits for a remote deposition pursuant to any remote deposition stipulation or order that the Court may subsequently enter. Pages of transcribed deposition testimony or exhibits to depositions that are designated **ATTORNEYS' EYES ONLY** pursuant to the process set out in this Order must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Order;

This limited amendment will ensure that depositions can proceed without delay this summer, while providing the parties additional time to determine whether any further progress can be made about Defendants' overall approach to AEO designations.

Third, Beginning in March, Defendants provided structured financial aid and admissions data, in response to a compromise reached between the parties with respect to such data called for in Plaintiffs' First and Second Requests for Production. Before processing these data, Plaintiffs and their consulting experts requested Defendants to provide "data dictionaries" so that Plaintiffs could be certain about the definitions of the multiple data fields. Once Defendants provided these dictionaries, a process that was largely completed on or about the beginning of May, Plaintiffs and their consultants were able to process the data, and to organize it in such a fashion as would permit detailed analysis. As the data processing has continued, Plaintiffs have requested from each Defendant (excepting Columbia, which will approached shortly after its data are more fully processed) further clarifications about certain data fields, most importantly which data fields constituted the Expected Family Contributions (EFCs) that each of the Defendants actually used in making their financial need and aid determinations, data which are central to both the liability and damage phases of the case. As of the date of this JSR, the data clarification process is ongoing and may continue as Plaintiffs require resolution of certain issues. But at minimum, Plaintiffs need to know the fields in the Financial Aid structured data that refer to the actual EFCs Defendants have used in making their financial determinations. While several Defendants have provided this information, others still have not. Accordingly, Plaintiffs ask that the Court order production of this information to Plaintiffs no later than June 16, 2023.

Fourth, Plaintiffs are at an impasse with Defendants on whether Defendants will provide them with records necessary accurately to respond to certain interrogatories. In their First Set of Interrogatories, Defendants served interrogatories seeking detailed information about the kinds and amounts of aid they were offered and actually received.[1] To comply, Plaintiffs diligently made

[1] **Interrogatory 1:** For each Institution to which You applied for admission for a fulltime undergraduate program, state (a) whether You applied early decision, early action, regular decision, and/or as a transfer;

FERPA request for the relevant records from every third-party university to which they applied. Similarly, because the interrogatories requested information about applications to Defendants themselves, on April 18, 2023, Plaintiffs made a records request to Defendants. *See* Exhibit A. Plaintiffs then followed up on that request on April 25 and May 17. *Id*.

On May 30, 2023—nearly six weeks after the initial FERPA request—Defendants finally notified Plaintiffs that they had taken no steps to gather records and indeed refused to provide them. *See* Exhibit A. In meet and confer, Mr. Suggs speculated that Plaintiffs' emails did not constitute valid FERPA requests, yet FERPA does not prescribe a form of request. Mr. Suggs also told Plaintiffs that the Defendants "might" not have all such records, yet he never searched and does not know. Mr. Suggs also said he did not know what Plaintiffs mean by records sufficient to respond to Interrogatories 1 and 2. Defendants wrote those interrogatories and must understand the information necessary to respond to them.

On Wednesday, May 17, Plaintiffs wrote to Mr. Suggs: "From where I sit, it appears that Defendants would for some reason prefer to receive interrogatory responses unaided by [Defendants' own] institutional FERPA records. It would be helpful to have an open and frank discussion about why that is the case." *See* Exhibit A. Defendants have never gotten any direct answer from Defendants explaining why they do not want Plaintiffs to see accurate institutional

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(b) whether You were admitted, rejected, waitlisted, admitted off the waitlist, and/or deferred; (c) the categories and amounts of merit- or need-based financial aid for which You applied in each year, whether from an Institution or other third-party (e.g., scholarship); (d) the categories and amounts of financial aid You were awarded (e.g., grant, work-study, loan) in each year, whether from an Institution or other third-party; (e) whether You appealed or requested a modification to the amount of financial aid You were awarded in each year (and if so, whether and how the award was modified); and (f) the amount of Your expected family contribution as determined by that Institution in each year you were awarded financial aid.
Interrogatory 2: Identify all individuals or entities who provided the funding used to pay the costs of Your undergraduate studies (including tuition and fees, room, board, and books and supplies) that were not fully covered by financial aid, and for each such individual or entity state the amount provided by such person by year and the terms on which such funding was provided (e.g., whether the funding was provided to You or on Your behalf as a gift, donation, loan, allowance, or credit, or whether there were any other conditions or requirements on which such funding was provided to You or on Your behalf).

records when drafting their responses to Defendants' interrogatories. Defendants may believe they gain some advantage by forcing Plaintiffs to give inaccurate and incomplete responses to the interrogatories, that then must be amended and supplemented after Plaintiffs finally get Defendants' own FERPA records. Whatever the motivations at play, the back-and-forth has gone on long enough and calls for the Court's guidance.

Fifth, Defendants have not produced full sets of key documents. Defendants have not produced the Consensus Methodology elements as used in each year over the past 20 years. Also, Plaintiffs discovered only last month, through document review, that the 568 Group was engaged in a systematic exchange of granular financial aid and admissions data through a series of "color books" (Yellowbook, Bluebook, Brownbook, etc.), published every year by the Consortium on Financing Higher Education (COFHE), which housed and provided administrative support to the 568 Group and acted as a hub for the 568 Group's communications and exchange of information central to the claims in this case. Defendants have produced documents making clear that access to the books was conditioned on 568 Group participation. Plaintiffs do not have a full set of color books from any Defendant, much less all documents related to and mentioning the color books. Since exchange of the color books was integral to the information sharing aspect of the conspiracy, Plaintiffs will need to move to compel if this issue is not resolved quickly and therefore wanted to bring this important issue to the Court's attention.

II. Defendants' Statement of Relevant Issues

Defendants were surprised by several of the topics included in Plaintiffs' portion of this status report, including one "issue" that Defendants learned about yesterday for the first time. Defendants' responses to Plaintiffs' statement are below, as well as a brief update regarding the status of Plaintiffs' parents' document productions.

First, there is no ripe dispute regarding Attorneys' Eyes Only ("AEO") designations. As Plaintiffs acknowledge, the parties have made substantial progress in addressing Plaintiffs' expressed concerns regarding AEO designations in certain Defendants' document productions, and Defendants will continue to work cooperatively with Plaintiffs. Paragraph 12 of the Confidentiality Order includes a specific process to address any disagreement about confidentiality designations. When Plaintiffs have brought specific documents to a Defendant's attention using that process, each Defendant has responded promptly and addressed Plaintiffs' concerns. Additionally, when Plaintiffs have raised concerns with particular Defendants about confidentiality designations, those Defendants have agreed to undertake additional measures to address Plaintiffs' concerns and to avoid burdening the Court with this issue. Defendants remain willing to consider further reasonable compromise or accommodation.[2]

Second, Plaintiffs have not been "stymied when trying to show AEO-tagged documents to a Defendants' own current and former employees." JSR at 2. In the two depositions that have taken place to date, Plaintiffs neither used AEO documents nor raised this issue with those Defendants. When Plaintiffs have sought consent from specific Defendants to use AEO documents with specific witnesses in upcoming depositions, those parties have been able to reach agreement. And

[2] Defendants disagree that certain "percentages" of documents designated as AEO is indicative of "excessive designation" because such percentages are highly dependent upon the individual school's unique documents and the overall volume.

Defendants have committed to working with Plaintiffs in good faith to address the use of specific documents at specific depositions when necessary.

The blanket revision to the Confidentiality Order that Plaintiffs now seek is unnecessary, and undermines the agreement the parties negotiated with respect to the use of AEO documents. The Confidentiality Order already permits Plaintiffs to show AEO documents to any deponent who authored or received the document; the modification Plaintiffs now seek would permit any current employee of the producing university to be shown these documents, regardless of whether the deponent ever saw the document before or was in a department that had access to the document. There are good reasons for the current provision, which is quite standard in protective orders. For example, it may be inappropriate for lower-level employees to be privy to certain sensitive human resources information about other employees, strategic plans known only to the university's senior leadership, or board-level documents. Accordingly, any modification to the parties' agreed-upon process is best considered on a case-by-case basis in light of concrete information, rather than in the abstract—and even then, only after Plaintiffs have actually raised an issue regarding a specific document with a specific Defendant and reached an impasse.

Third, Plaintiffs have reached out to a number of Defendants (including as recently as this week) with questions regarding the Defendants' structured financial aid data and, in particular, data related to the Expected Family Contribution ("EFC"). Defendants who have been asked to identify their structured data fields capturing EFC have either already responded to Plaintiffs or are in the process of gathering information necessary to do so, and will provide that information by July 1, 2023 (the next deadline for production of documents, including structured data).

Fourth, Defendants served Plaintiffs with four interrogatories in September 2022. The Court ordered Plaintiffs to answer two of them in February 2023. Hr'g Tr. 20:13-18, Feb. 8, 2023.

Plaintiffs still have not answered. Instead, they now ask the Court for "guidance" about a "records request," purportedly under FERPA, for information potentially responsive to the interrogatories.

There is no ripe dispute for the Court to resolve at this time. Plaintiffs notably do not claim that their "records request" relates to any deficiency in Defendants' document productions. Nor could they, because Defendants have produced voluminous information that Plaintiffs could use to inform their interrogatory responses, including structured data containing details about Plaintiffs' financial aid awards, as well as other documents about those aid awards.[3]

Plaintiffs suggest that Defendants have "refused to gather records" in response to a FERPA request. To the contrary, Defendants have asked Plaintiffs to identify the records they believe they need and have agreed to consider any specific request. Plaintiffs have not specified which records they want from which Defendant(s). For example, their initial request stated, "[P]laintiffs will have to rely on records from the defendants' offices [to respond to the interrogatories]. . . . Plaintiffs hereby request that information from defendants' offices."

More fundamentally, Plaintiffs should answer the interrogatories with the information in their possession, as ordered by the Court in February. Defendants are not obligated to answer the interrogatories for Plaintiffs, directly or indirectly. Plaintiffs already attempted to avoid answering the interrogatories on the ground that Defendants have responsive information in their own files, and the Court ordered them to respond anyway. *See* Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Compel Disc. at 3, *Henry v. Brown Univ.*, No. 22-cv-125 (N.D. Ill. Jan. 25, 2023), ECF No. 298; Hr'g Tr. 20:13-18, Feb. 8, 2023. Defendants have now produced ample information regarding their

[3] The structured data is de-identified to protect Personally Identifiable Information under FERPA. Plaintiffs have never requested their unique identification codes associated with their own data, but Defendants, in an attempt to resolve any concern about Plaintiffs' supposed need for data, recently provided those identifiers unsolicited.

financial aid. Moreover, the interrogatories seek information that Defendants do not have, such as persons "who provided the funding used to pay the costs of [Plaintiffs'] undergraduate studies."

Accordingly, there is no need for this Court to provide "guidance" to Plaintiffs.

Fifth, Plaintiffs' issue concerning COFHE "color books" was raised for the first time as to most Defendants when they received Plaintiffs' draft of their portion of this JSR. As such, Defendants are at a loss as to why it has been included in the JSR at all. We note that some Defendants have already produced numerous COFHE reports that Plaintiffs are now asking about. In addition, Plaintiffs have issued a subpoena to COFHE in which the information that Plaintiffs describe has presumably been requested, and COFHE recently produced documents in response to that subpoena. Should discovery from COFHE not resolve that issue, Defendants will, of course, be available to meet and confer with Plaintiffs as to the referenced documents. And as a general matter, if Plaintiffs believe that any Defendant has failed to comply with its discovery obligations, then they should raise such concerns with that Defendant in the first instance. Raising issues for the first time in a JSR (along with a threatened motion to compel), when Plaintiffs have not even discussed these issues with the Defendants, is simply not the correct approach.

Sixth, Plaintiffs' parents made a first production of documents on June 2, 2023. Of the 13 parents subpoenaed, two parents produced a total of 31 documents. Plaintiffs informed Defendants that the productions of the parents' documents are now substantially complete.

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Respectfully submitted,

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